

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529

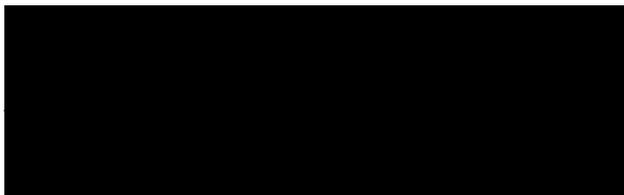
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D 7



FILE: WAC 03 198 50131 Office: CALIFORNIA SERVICE CENTER Date: **AUG 15 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established June 18, 2003, and is described as a cultural and economic exchange business between the United States and China. The petitioner claims to be a subsidiary of Chengdu Municipal Foreign Affairs Office, located in Sichuan, China. It seeks to employ the beneficiary temporarily in the United States as the manager of its new office for three years. The director determined that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, the petitioner disagrees with the director's decision and asserts that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

- (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
- (3) The organizational structure of the foreign entity.

The petitioner initially described the beneficiary's proposed duties in the petition by stating that he would be responsible for conducting cultural and economic exchanges between the United States and China, mainly between Phoenix, Arizona and Chengdu, its sister city in China. In a letter of support, dated September 1, 2003, a representative from the foreign entity described the beneficiary as being appointed as deputy division chief of the American & Oceanic Affairs Division of Chengdu Municipal Foreign Affairs Office where he had been responsible for supervising and conducting international exchange programs. The representative continues by describing the beneficiary's role in past educational, cultural, and economic exchange projects by stating that he received, trained, and escorted students, and served as official interpreter. The foreign entity representative described the beneficiary's proposed duties as: "Liaise with the local government on behalf of Chengdu, continue to conduct the exchange programs, receive the official delegations from Chengdu, help organize the local government officials and business persons to visit Chengdu and other cities in China, other activities beneficial to both cities, etc."

The director denied the petition, after determining that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director noted that although the petitioner claimed that the beneficiary would coordinate cultural and educational exchanges, this fact did not establish eligibility for classification as an intracompany transferee. The director noted that there would be no one employed by the U.S. entity besides the beneficiary. And, therefore, the beneficiary would be performing the day-to-day duties of the organization, including those of an agent, rather than managing the activities through a subordinate staff.

On appeal, the petitioner disagrees with the director's decision and asserts that the beneficiary has invested a substantial amount of money in the new business; that the beneficiary will be hiring managers and professionals to conduct the business; that the beneficiary will hire a manager to make preparations for opening a Chinese restaurant in Phoenix, and a manager to develop regular business; and that the beneficiary's duties will be "decision-making and management." The petitioner submitted as evidence a letter, dated November 21, 2003, written by congressman Ed Pastor stating the importance of having the beneficiary continue his involvement in the Phoenix Sister City Program.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will be doing on a day-to-day basis. For example, the petitioner states that

the beneficiary's duties will include: liaison with local government, conduct the exchange programs, receive official delegations, and coordinate cultural, educational, and economic exchanges. The petitioner did not, however, clarify how the activities are managerial or executive in nature. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary will spend on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as coordinating cultural, educational, and economic exchanges between the United States and China, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Although the petitioner asserts that the beneficiary will be managing a subordinate staff, the record does not establish that the subordinate staff will be composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary will be primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plan and the size of the United States investment, and establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. In the instant matter, the evidence in the record is insufficient to establish that the petitioning entity will be able to support an executive or managerial position within one year of approval of the petition. The business plan is vague and does not demonstrate a realistic expectation that the enterprise will be able to move away from the developmental stage to full operations within its first year. Accordingly, the appeal will be dismissed.

Although not directly addressed by the director, another issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that it has obtained sufficient physical premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A). In the instant matter, the director submitted a request for evidence, dated August 26, 2003, in which he directed the petitioner to submit evidence to demonstrate that sufficient physical premises to house the office had been secured. In response to the director's request for evidence on the subject, the petitioner submitted a copy of a one year apartment rental agreement entered into

by the beneficiary, and to commence on July 1, 2003. The beneficiary stated that he had rented a 1,200 square foot apartment with two bedrooms and a sitting room as office space. The beneficiary also stated that he would be using the apartment until such time as he was able to locate another premises sufficient to house the new office. It is noted for the record that the instant petition was filed on June 24, 2003. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In addition, there is no evidence in the record to show that the size and space requirements for the operation of the petitioner's business have been adequately met. For this additional reason, the petition may not be approved.

Beyond the decision of the director, another issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that a qualifying relationship exists between the U.S. and foreign entities. The petitioner claimed that the U.S. entity was a subsidiary of Chengdu Municipal Foreign Affairs Office. The director requested that the petitioner submit proof of stock purchase, stock certificates, a stock ledger, Notice of Transaction Pursuant to Corporation Code Section 25102(f), and complete Articles of Incorporation. The petitioner failed to submit the evidence as requested. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant matter, the petitioner has failed to submit evidence to demonstrate ownership and control over the U.S. entity by another foreign entity. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp.2nd 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.